

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re BYRON B., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

BYRON B.,

Defendant and Appellant.

E034871

(Super.Ct.No. J099254)

OPINION

APPEAL from the Superior Court of Riverside County. Elva R. Soper, Judge.
(Retired Judge of the Los Angeles Sup. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed.

Kathleen Bryan, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Gil P. Gonzalez,

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion
is certified for publication with the exception of parts I and II.

Supervising Deputy Attorney General, and Andrew S. Mestman, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Byron B. and two juvenile accomplices stole a video game player and some cool shoes from an acquaintance's house. As a result, appellant was adjudged a ward of the court and placed on probation. One probation condition prohibited him from associating with anyone disapproved by a parent or probation officer. In the published portion of this opinion, we will hold that, although the juvenile court could not forbid association with any person "not approved," it could forbid association with any person "disapproved," as long as it also required that appellant know of the disapproval. We will affirm the judgment.

I

FACTUAL BACKGROUND

Monday, February 17, 2003, was President's Day. Around 4:00 p.m., victim Aaron T. left his house.¹ He left the front door locked, but a sliding glass door was

¹ Aaron's testimony was contradictory, confusing, and at times unintentionally funny. The prosecutor was reduced to using leading questions to elicit the expected testimony.

No one is suggesting, however, that Aaron was not the victim of a crime, or that the persons who confessed to it did not actually commit it. The main factual question was whether these confessions were truthful when they implicated appellant. The inconsistencies in Aaron's testimony were irrelevant to this question.

In summarizing Aaron's testimony, we have selected the version that most closely matches the statements of other witnesses or declarants and thus appears to be most accurate.

unlocked. He was gone overnight. When he returned, he found that his Xbox and a pair of Avirex shoes were missing from his room.

A neighbor's statement to Aaron was admitted solely to explain Aaron's subsequent actions, and not for its truth. The neighbor said he had seen two boys knock on Aaron's door, but "nobody was there." One boy had a backpack; when they left, it seemed to be "filled up with stuff."

On February 20, 2003, Aaron went to the home of Wayne E. and accused him of stealing his property. Wayne's mother called the police and reported a "disturbance." Riverside Sheriff's Deputy Joshua Rhodes responded. He talked to Wayne, but Wayne denied knowing anything about the theft.

Deputy Rhodes contacted Aaron. Aaron said Wayne had been seen at his house.

Deputy Rhodes then talked to Wayne again. At trial, Wayne refused to testify, invoking his Fifth Amendment privilege. The juvenile court found that he was unavailable as a witness. According to Deputy Rhodes, Wayne told him that Chad J. and appellant had decided to go to Aaron's house and take his shoes and Xbox. Chad and appellant entered through the back of the house. When they came back out, Chad had the shoes, and appellant had the Xbox.

Next, Deputy Rhodes talked to Chad. At first, Chad denied knowing anything about the theft. Deputy Rhodes, however, told him that Wayne had already implicated him, as well as appellant. Also, Chad's father told him not to lie to the police officer. Chad then gave Deputy Rhodes the same account he gave at trial.

Chad had “already pled to this case” and did not assert a Fifth Amendment privilege. He testified that Wayne and appellant were at his house when they saw Aaron come down the street. Chad wanted some shoes Aaron had; he noticed that Aaron was not wearing them. Wayne suggested that they go to Aaron’s house and take his “stuff.” Chad said he would take the shoes. Appellant said he would take the Xbox.

Around noon or 1:00 p.m., they went to Aaron’s house. Wayne waited outside while Chad and appellant went in through a sliding door in the back. Chad took the shoes, putting them in his backpack; appellant took the Xbox.

Deputy Rhodes tried to talk to appellant and was able to do so “[b]riefly.” He also tried to talk to appellant’s father but was not able to do so. Appellant’s father never told him appellant had an alibi for February 17.

Eventually, Chad returned the shoes to Aaron. Chad’s father bought Aaron a new Xbox.

Appellant’s father, Dennis B., testified that on February 17, 2003, appellant was with him all day. At 10:00 a.m., they went to appellant’s grandmother’s house to fix her shower. They went to Home Depot, Lowe’s, and Ace Hardware, looking for parts. At 1:00 or 1:45 p.m., they went to the Mission Grove Theater. Appellant’s father saw *Star Trek: Nemesis*; appellant saw a different movie. At 3:30 or 4:00 p.m., they went to Tina’s Mexican restaurant to get take-out food. On the way there, appellant’s father called his wife and asked her what she wanted. She asked him to order her a deluxe burrito. Appellant ordered a carne asada burrito, with no onions. Appellant’s father ordered two chicken tacos, with an extra chicken taco and “no onions on the enchilada

[sic].” Every Monday, they went to the movies, and then to Tina’s; appellant’s father always ordered the same thing.

On Thursday, February 20, appellant’s father got home to find Deputy Rhodes in the front yard, talking to his wife. He asked what was going on. Deputy Rhodes said appellant had been involved in a burglary “a couple [of] days ago.” Appellant’s father said that was impossible; on Tuesday, appellant had been at school and had come home at the usual time; on Monday, he told Deputy Rhodes, appellant had been with him all day.

Deputy Rhodes wanted to talk to appellant. Appellant’s father did not let him come out of the house, but Deputy Rhodes could have talked to him through the door. In Deputy Rhodes’s presence, appellant’s father asked appellant if he was involved; he said, “[N]o.”

Deputy Rhodes played a tape recording of Wayne’s statement, then asked several times to search the house. Appellant’s father refused to let him do so without a warrant.

II

THE ADMISSION OF WAYNE’S STATEMENT

Appellant asserts that Wayne’s statement to Deputy Rhodes was inadmissible hearsay, and therefore defense counsel’s failure to object to it constituted ineffective assistance.

“To demonstrate ineffective assistance of counsel, defendant must show both that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for

counsel's unprofessional errors, the result would have been different. [Citation.]" (People v. Cleveland (2004) 32 Cal.4th 704, 746.) "If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. [Citation.]" [Citation.]" (People v. Sapp (2003) 31 Cal.4th 240, 263, quoting People v. Kipp (2001) 26 Cal.4th 1100, 1123.)

We may assume that Wayne's statement was inadmissible. We may further assume that no reasonable attorney would have failed to object to it. It does not matter whether the statement was inadmissible as a matter of federal constitutional law under *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] -- or, for that matter, under the recently decided case of *Crawford v. Washington* (2004) 541 U.S. ____ [124 S.Ct. 1354] -- or as a matter of state constitutional or statutory law. In either event, we still must use the reasonable probability standard in assessing prejudice.

Appellant cannot show a reasonable probability that the exclusion of Wayne's statement would have led to a different outcome. Chad testified that he committed the crime with both appellant and Wayne. Wayne's statement tended to corroborate Chad. Appellant's father, on the other hand, testified that appellant could not possibly have been involved.

The juvenile court believed Chad and Wayne and disbelieved appellant's father. It explained: "The only one in this case that seems to have perfect memory is Dennis B[.] Nobody remembers that perfectly that long ago. It would have been so easy to check the alibis that he gave had he given the information right then." It continued: "[He] was just

too set in his testimony. I have no reason to disbelieve the children. I have no reason to question it because they don't know exactly what time or exactly where something was.”

If Wayne's statement had not come in, the juvenile court still would have had to choose between (so to speak) Chad and Dad. Ordinarily, an accomplice's testimony is suspect because he or she may be seeking immunity or trying to shift the blame. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) Chad, however, had nothing to gain by implicating appellant. Commendably, he had already taken full responsibility for his actions by returning or replacing the stolen items and by admitting the allegations of a delinquency petition against him. Arguably, the neighbor's statement that he saw two, rather than three, boys outside Aaron's house cast some doubt on Chad's account. This statement, however, was not admitted for its truth. Finally, the juvenile court rejected appellant's father's testimony because it was too detailed and pat. Accordingly, it appears that the juvenile court would have believed Chad, and disbelieved appellant's father, even without Wayne's statement.

We therefore reject appellant's claim of ineffective assistance of counsel.

III

“NO CONTACT” PROBATION CONDITION

Appellant asserts that the juvenile court abused its discretion by imposing a probation condition prohibiting contact with any person disapproved by a parent or probation officer.

The juvenile court's oral ruling stated that appellant must “[n]ot have any direct or indirect contact with anyone disapproved by parent, guardian, probation officer or staff.”

Its minute order, however, recited that appellant must “[n]ot have direct or indirect contact with anyone *known to be* disapproved by parent(s)/guardian(s)/probation officer, staff.” (Italics added.)

Appellant did not object to this condition at sentencing. The People therefore argue that he waived his challenge to it, although they acknowledge that there is contrary authority. (See *In re Justin S.* (2001) 93 Cal.App.4th 811, 813-815.) This issue is presently before the Supreme Court in *In re Sheena K.* (2004) 116 Cal.App.4th 436, review granted June 9, 2004, S123980. Because we come to the same result on the merits, we assume, without deciding, that the contention has not been waived.

“A juvenile court is vested with broad discretion to select appropriate probation conditions. [Citation.] The court may impose any reasonable condition that is ‘fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.’ ([Welf. & Inst. Code,] § 730, subd. (b).)” (*In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.)

An adult probation condition is unreasonable if “it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ [Citation.]” (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted, quoting *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.) In addition, an adult probation condition is overbroad if unduly restricts the exercise of a constitutional right. “[C]onditions of probation that impinge on constitutional rights must be tailored carefully and ‘reasonably related to the compelling state interest in reformation and rehabilitation

. . . .” [Citation.]” (*People v. Delvalle* (1994) 26 Cal.App.4th 869, 879, quoting *People v. Mason* (1971) 5 Cal.3d 759, 768 [dis. opn. of Peters, J.])

However, “[t]he juvenile court’s broad discretion to fashion appropriate conditions of probation is distinguishable from that exercised by an adult court when sentencing an adult offender to probation. Although the goal of both types of probation is the rehabilitation of the offender, ‘[j]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment; it is an ingredient of a final order for the minor’s reformation and rehabilitation.’ [Citation.] . . . [¶] In light of this difference, a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. [Citations.] ““Even conditions which infringe on constitutional rights may not be invalid if tailored specifically to meet the needs of the juvenile [citation].”” [Citations.]” (*In re Tyrell J.* (1994) 8 Cal.4th 68, 81-82, quoting *In re Ronnie P.* (1992) 10 Cal.App.4th 1079, 1089 and *In re Binh L.* (1992) 5 Cal.App.4th 194, 203, quoting *In re Michael D.* (1989) 214 Cal.App.3d 1610, 1616.)

We are aware of two cases dealing with a probation condition like the one here. First, in *In re Frank V.* (1991) 233 Cal.App.3d 1232, a gun was found in the minor’s pocket. (*Id.* at p. 1237.) One probation condition required him not to “associate with anyone disapproved of by his probation officer.” (*Ibid.*) He challenged this condition as overbroad and as infringing his constitutional right of association. (*Id.* at p. 1241.)

The appellate court upheld the condition. It began by noting that: “Although minors possess constitutional rights [citation], ‘[i]t is equally well established . . . that the

liberty interest of a minor is not coextensive with that of an adult. “[E]ven where there is an invasion of protected freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.’” [Citations.] Parents, of course, have powers greater than that of the state to curtail a child’s exercise of the constitutional rights the child may otherwise enjoy, for a parent’s own constitutionally protected “liberty” includes the right to “bring up children” [citation,] and to “direct the upbringing and education of children.” [Citation.]’ [Citation.] [¶] Frank was declared a ward of the court, which acts in *parens patriae*.” (*In re Frank V.*, *supra*, 233 Cal.App.3d at pp. 1242-1243, quoting *In re Roger S.* (1977) 19 Cal.3d 921, 928.)

The court concluded: “His purchase of the .38-caliber automatic discovered in his jacket from an unknown ‘person on the streets’ demonstrates the need for such control and the rational relation between the crime and the condition. The juvenile court could not reasonably be expected to define with precision all classes of persons which might influence Frank to commit further bad acts. It may instead rely on the discretion of his parents, and the probation department acting as parent, to promote and nurture his rehabilitation.” (*In re Frank V.*, *supra*, 233 Cal.App.3d at p 1243.) “The probation condition is consistent with the rehabilitative purpose of probation and constitutional parental authority. Frank’s constitutional right of association has not been impermissibly burdened.” (*Ibid.*)

Next, in *In re Kacy S.* (1998) 68 Cal.App.4th 704, the challenged probation condition required the minor not to “associate with any persons not approved by his probation officer” (*Id.* at p. 712.) The court held this condition was both

unreasonable and overbroad because it “literally requires the probation officer to approve Daren’s ‘associat[ion]’ with ‘persons’ such as grocery clerks, mailcarriers and health care providers. Nor does the present record justify such a sweeping limitation on Daren’s liberty. [Citation.]” (*Id.* at p. 713.) The court did not cite or discuss *Frank V.*

The crucial difference between *Kacy S.* and *Frank V.* is that the valid probation condition referred to persons “disapproved”; the invalid one referred to persons “not approved.” Typically, grocery clerks, mailcarriers and health care providers have been neither approved nor disapproved. Requiring advance approval is impractical. A parent or probation officer can hardly be expected to specify all of the innocuous people with whom the minor may come into contact. Requiring advance disapproval makes the probation condition workable and saves it from overbreadth.

The probation condition here referred to persons “disapproved.” Thus, *Frank V.* applies. The juvenile court, acting in *parens patriae*, could limit appellant’s right of association in ways that it arguably could not limit an adult’s. Appellant asserts that the condition “is too broad to be reasonably related to future criminality. . . . [T]here is nothing to suggest that the minor routinely got in trouble by associating with the wrong types of people.” In *Frank V.*, however, there likewise was no evidence that the minor “routinely” associated with bad eggs. Here, as in *Frank V.*, there was evidence that, solely in the case before the court, appellant’s misconduct had been influenced by other people. Indeed, here appellant acted in concert with two other delinquents.

So far, we have been discussing only unreasonableness and overbreadth. However, a probation condition also may be challenged as excessively vague. “It is an

essential component of due process that individuals be given fair notice of those acts which may lead to a loss of liberty. [Citations.] This is true whether the loss of liberty arises from a criminal conviction or the revocation of probation. [Citations.] [¶] “‘Fair notice’ requires only that a violation be described with a “‘reasonable degree of certainty” . . . so that ‘ordinary people can understand what conduct is prohibited.’” [Citation.]” (*In re Angel J.* (1992) 9 Cal.App.4th 1096, 1101-1102, quoting *In re Robert M.* (1985) 163 Cal.App.3d 812, 816, quoting *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 270-271.)

We may assume, without deciding, that a probation condition prohibiting contact with disapproved persons regardless of whether the minor knew of the disapproval would be unconstitutionally vague. (See *In re Justin S.*, *supra*, 93 Cal.App.4th at p. 816.) Even if so, the condition here does seem to imply that the minor must be aware of the disapproval. In any event, unlike the juvenile court’s oral ruling, its minute order did include the crucial words, “known to be.” The clerk’s minutes and the reporter’s transcript are to be harmonized, if possible. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) In this case, the clerk’s transcript simply clarifies a point that the reporter’s transcript left ambiguous. We conclude that the minute order correctly recites the juvenile court’s ruling. (*People v. Bowie* (1962) 200 Cal.App.2d 291, 294; *People v. Perkins* (1959) 172 Cal.App.2d 781, 783.) Accordingly, regardless of whether appellant waived his vagueness contention, the probation condition, as stated in the minute order, is not unreasonable, overbroad, or void for vagueness.

IV

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

GAUT
J.